BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6731 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

ROBERT A. SANOW
(Claimant-Respondent)

S.S.A. No.

NORTHWEST PUBLICATIONS, INC.
(Employer-Appellant)

Employer Account No.

PRECEDENT
BENEFIT DECISION
No. P-B-261

FORMERLY
BENEFIT DECISION
No. 6731

The employer appealed from Referee's Decision No. SJ-3048 which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's reserve account is not relieved of benefit charges under section 1032 of the code. Written argument was submitted on behalf of the employer.

STATEMENT OF FACTS

The claimant was employed by the employer as a part-time driver in the circulation department from December 24, 1962 until March 22, 1963. When the claimant reported to work on March 22, 1963 he was arrested by the police on a charge of failure to provide child support. The claimant was taken to the police station, after which he was also charged with an attempt to evade and resist arrest in violation of section 148 of the California Penal Code.

The claimant was immediately replaced by the employer and discharged because of the nature of the

criminal charges. It was felt that such an arrest record would make the claimant unsuitable for newspaper circulation work involving groups of young boys. When the claimant was interviewed by a representative of the Department of Employment on May 22, 1963, he stated that he had been making child support payments and that the charge against him was false.

In connection with the employer's appeal, we have admitted into evidence information from the employer that a jury trial on the two charges is scheduled to be held sometime during the year 1964.

The question before us for consideration is whether unemployment insurance benefits should be denied to a claimant whose employment was terminated because of his arrest on a charge which the claimant denies and of which he has not been convicted.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual shall be disqualified for benefits if he left his most recent work voluntarily without good cause or if he has been discharged for misconduct connected with his most recent work.

In Benefit Decision No. 6694, we held that the claimant's loss of employment was attributable to an act of his own volition where he was immediately replaced and discharged after he was arrested and incarcerated upon a criminal charge in connection with which he was convicted of a lesser offense. We concluded that the claimant by his commission of a criminal offense which resulted in his arrest and replacement voluntarily left his most recent work without good cause within the meaning of section 1256 of the code. In so holding, we followed the position taken by the California District Court of Appeal in Sherman/Bertram, Inc. v. California Department of Employment (1962), 202 Cal. App. 2d 733, 21 Cal. Rptr. 130, that the claimant in that case voluntarily left his work without good cause when he was replaced by the employer after two weeks of incarceration while serving a 30-day jail sentence for a hit-and-run accident. On the other hand, in numerous previous decisions, we have held that a person is presumed to be innocent of crime or wrong under section 1963(1) of the California Code of Civil Procedure /now repealed - see Evidence Code, Section 520/ (Benefit Decisions Nos. 5672, 6637 and 6709).

In the present case, the claimant was replaced and discharged when he failed to report to work because he was arrested. The claimant has denied that he is guilty of the failure to provide charge, and has apparently entered pleas of not guilty to both that and the other pending criminal charge. The employer has failed to establish that the claimant performed any act which resulted in the arrest and the consequent termination of the employment relationship. Under these circumstances, we hold that the claimant is entitled to the presumption of innocence and that the claimant is not disqualified for benefits under section 1256 of the code. From the record before us, we must hold that the claimant neither voluntarily left his most recent work nor was he discharged for misconduct connected with his most recent work. We expressly distinguish the Sherman/Bertram case, supra, and Benefit Decision No. 6694 where the evidence was clear that the claimants had performed acts which resulted in their conviction and incarceration and inability to work for their employers and the presumption of innocence was no longer applicable.

We realize that there might appear to be some element of unfairness in holding that the employer's reserve account may not be relieved of benefit charges even though it did nothing to bring about the claimant's inability to work, at least temporarily, because of his arrest and incarceration on criminal charges. Nevertheless, the employer has not established that the claimant voluntarily brought about this result and any inequities which may exist in this type of situation are a matter for resolution through legislative action and not through ignoring existing legislation and well-established principles.

DECISION

The decision of the referee is affirmed. The claimant is not disqualified for benefits under section

1256 of the code. The employer's reserve account is not relieved of benefit charges under section 1032 of the code.

Sacramento, California, November 21, 1963.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 6731 is hereby designated as Precedent Decision No. P-B-261.

Sacramento, California, March 9, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

In this case the claimant was discharged when he was arrested on a charge of failure to provide child support. The majority conclude that the claimant is not disqualified for benefits under section 1256 of the code because: "The employer has failed to establish that the claimant performed any act which resulted in the arrest and the consequent termination of the employment relationship."

Although it is true that Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, places the burden upon the employer to establish "misconduct" within the meaning of section 1256, the present case appears to enlarge that rule by declaring that an employer who discharges an employee who has been arrested has the burden of proving each element of the crime with which the employee is charged. Where, as here, the termination occurs prior to the time the claimant is brought to trial on the criminal charge, an impossible burden is placed on the employer. This is especially true where the alleged offense does not arise out of the claimant's work and no evidence is available to the employer.

Prosecution of criminal matters is undertaken by the district attorney, and such proceedings are held in the municipal court if misdemeanors or in the superior court if felonies. Although one accused of crime has a constitutional right to be brought before a magistrate soon after his arrest, the actual trial of the case on its merits is usually several months in the offing.

Both state and federal law require the expeditious processing and determination of claims for unemployment insurance benefits and the matter is calendared, invariably, for hearing before an Administrative Law Judge and for resolution by this Board prior to trial of the penal charge in the criminal courts.

Prosecutors take an exceedingly dim view of having their cases previewed in the administrative arena. Persons who may be witnesses for the prosecution at the

criminal proceeding are reluctant to give testimony at an earlier administrative hearing, particularly where the district attorney is not present to conduct the questioning and to protect against unfair cross-examination. It must be kept in mind that the rules of admissibility of evidence are much more liberal in administrative proceedings than is true in judicial trials. And, as there is a limitation on the use of discovery procedures in criminal matters, the hearing before the Administrative Law Judge could be fertile ground for defense counsel to interrogate a prosecution witness. Thus, it is seldom, if ever, that a full panoply of facts will be presented by or on behalf of the employer. And, in the rare instance when the employer does make out a prima facie case of misconduct under section 1256, the claimant is then placed in an untenable position. The claimant must either prematurely present the defense he would have saved for the criminal proceeding, or forego unemployment insurance benefits.

For these reasons, I believe the rule announced by the majority in this case is unsound as a matter of law. It imposes a burden which is impossible to meet.

HARRY K. GRAFE